Supreme Court, U. S.
FILED
MAR 25 1977
MICHAEL RODAK, JR., CLERK

Nos. 75-1126 and 75-1385

In the Supreme Court of the United States

OCTOBER TERM, 1976

TRANS WORLD AIRLINES, INC., PETITIONER

v.

LARRY G. HARDISON, ET AL.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, ET AL., PETITIONERS

v.

LARRY G. HARDISON, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

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BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

QUESTIONS PRESENTED

Title VII of the Civil Rights Act of 1964 and Equal Employment Opportunity Commission Guidelines prohibit the discharge of an employee because of his religious observance or practice, unless the employer is unable reasonably to accommodate the employee's religious observance or practice without undue hard-

ship to the conduct of the employer's business. Petitioner Trans World Airlines, Inc., discharged respondent Larry G. Hardison because of his religious practice of refraining from work on Saturdays. The questions presented are:

1. Whether Trans World Airlines demonstrated an inability reasonably to accommodate Hardison's religious practice without undue hardship on the conduct of its business.

2. Whether the statute and guidelines violate the Establishment Clause of the First Amendment.

INTEREST OF THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Pursuant to Title VII of the Civil Rights Act of 1964, the Attorney General and the Equal Employment Opportunity Commission have responsibility for enforcement of federal laws providing for equal employment opportunity. Although this action was brought by a private plaintiff, the issues raised are similar to those arising in suits brought by the government. The resolution of the issues presented in this case will directly affect the government's enforcement responsibilities.

The Attorney General also has responsibility for enforcement of a variety of other federal laws proscribing discrimination on account of religion, including those requiring nondiscrimination in housing (42 U.S.C. 3601 *et seq.*), public accommodations (42 U.S.C. 2000a *et seq.*), public facilities (42 U.S.C. 2000b *et seq.*), public education (42 U.S.C. 2000c–6),

and certain other federally protected activities (18 U.S.C. 245).[1]

Pursuant to this interest, the government participated as *amicus curiae* in *Dewey* v. *Reynolds Metals Co.*, 402 U.S. 689, affirming by an equally divided Court 429 F.2d 324 (C.A. 6), and *Parker Seal Co.* v. *Cummins*, No. 75-478, decided November 2, 1976, affirming by an equally divided Court 516 F.2d 544 (C.A. 6), which also involved the validity of an employee's discharge because of his religious observance or practice.

STATEMENT

1. Petitioner Trans World Airlines, Inc. ("TWA"), is a common carrier engaged in the interstate and international transportation of passengers, cargo and mail (A. 23, 57). It employs approximately 37,000 persons at approximately 100 locations (A. 23, 59).

The company operates a maintenance and overhaul base at the Kansas City International Airport in Kansas City, Missouri (A. 23, 59). The base repairs, maintains, and overhauls aircraft and aircraft engines for

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[1] In addition, Civil Service Commission Regulations on Equal Opportunity require federal agencies to make reasonable accommodations to the religious needs of applicants and employees, including those who observe the Sabbath on days other than Sunday, when accommodation can be made without undue hardship on the business of the agency. See 5 C.F.R. 713.204(g). Guidelines issued pursuant to Executive Order 11246 by the Office of Federal Contract Compliance Programs of the Department of Labor similarly require contractors and subcontractors with the federal government, and contractors and subcontractors on federally-assisted construction contracts, to make reasonable accommodations to the religious observances and practices of employees and prospective employees. 41 C.F.R. 60–50.3.

TWA and approximately 30 other airlines (A. 23, 148-149). The facility is TWA's only overhaul base and its main major repair station (A. 149), and operates twenty-four hours a day, 365 days a year (A. 23, 102, 149).

Mechanics and related employees working for TWA are governed by a collective bargaining agreement between TWA and petitioner International Association of Machinists and Aerospace Workers (A. 22, 210-217). In Kansas City, the agreement is administered by petitioner Local 1650 at the local level and by petitioner District 142 at the district level (A. 22). The agreement provides in part that "[t]he principle of seniority shall apply * * * in all reductions or increases of force, preference of shift assignment, vacation period selection, in bidding for vacancies or new jobs, and in all promotions, demotions, or transfers involving classifications covered by this Agreement" and that "seniority shall apply in selection of shifts and days off within a classification within a department." The agreement also provides that "[e]xcept in an emergency, an employee will not be required to work overtime against his wishes" (A. 214, 216).

Respondent Larry G. Hardison began work for TWA on June 5, 1967, as a stores clerk in the Stores Department at Building No. 1 at the Kansas City overhaul base (A. 22, 23, 101). Building No. 1 is used for the overhaul of air frames. The Stores Department is responsible for delivering parts and materials to TWA's mechanics (A. 115-116, 149-150). As a stores clerk, Hardison's principal function was to deliver parts and materials to mechanics at the base (A. 213). Hardison

worked the "twilight shift" from 3:30 p.m. to 11:00 p.m., Monday through Friday (A. 66).

Hardison first became interested in the Worldwide Church of God in the spring of 1968 (A. 66, 72-73, 80). Members of this church refrain from working from sundown Friday to sundown Saturday and on several annual holy days (A. 22, 25, 67, 100-101). Hardison began to follow the precepts of the church in late September or early October 1968 and was baptized in February 1969 (A. 66, 73-74).

On April 25, 1968, shortly after he became interested in the church, Hardison wrote to Everett Kussmann, Manager of Store Systems at the overhaul base, requesting an appointment to discuss "a change in weekly days off" for religious reasons (A. 27-28). Kussmann met with Hardison and learned of Hardison's emerging religious beliefs concerning work on the church's Sabbath and holy days (A. 79, 117). Kussmann then wrote to Burns Prater, a TWA supervisor for the Stores Department, that the union steward should attempt to swap Hardison's days off, to excuse Hardison's absences on Worldwide Church of God holy days if Hardison "works the Christian holiday[s] when requested," and that Prater should attempt to find Hardison another job not involving Saturday work (A. 28, 118-122). Prater responded on May 7, 1968:

> I haven't made any headway. His time off and day off requirement[s] are too difficult to handle. I understand that no one would swap days off with him [A. 28, 122].

No further action was taken by TWA in response to Hardison's request for time off. From May to September 1968, Hardison continued to work on Friday evenings and worked some voluntary overtime shifts on Saturdays (A. 73-74).

On September 6, 1968, Hardison advised Kussmann and James Tinder, his union steward, that his religious beliefs were becoming firmer and that his work schedule was going to be a problem (A. 73, 79-81, 108-109). He told Kussmann and Tinder that he had put in a bid for a different shift so that he could observe his Sabbath and that he would try to work out his problem within the seniority system (A. 80). By so bidding, Hardison obtained a position as stores clerk on the "graveyard shift" (11:00 p.m. to 7:00 a.m.) of the Stores Stockroom Section at Building No. 1 (A. 66-67, 73).

Since his work week on this shift began at 11:00 p.m. on Sunday and ended at 7:00 a.m. on Friday, he was able to observe his Sabbath without difficulty (A. 67). By letter of October 4, 1968, Hardison informed Kussmann that he had transferred to the graveyard shift to be able to observe his Sabbath and that he would soon enter the church. Kussmann requested and received from Hardison a list of Hardison's holy days for 1969 (A. 29-30, 74, 124).

On December 2, 1968, Hardison voluntarily transferred from the graveyard shift at the Stores Stockroom Section in Building 1 to a position on the day shift (7:00 a.m. to 3:30 p.m.) of the Stores Progress Section in Building 2 because he had recently married and believed that day-shift work would be more compatible with married life (A. 23, 67-68, 103). His job in

Building 2 was to drive a train continuously from shop to shop at the overhaul base to pick up and deliver materials (A. 75). Because the train ran on weekdays only (A. 76, 133), Hardison was able to observe his Sabbath (A. 68, 69).

The Stores Stockroom Section at Building 1 and the Stores Progress Section at Building 2 had separate seniority lists (A. 23-24, 75, 104). Hardison's seniority had placed him in the middle of the seniority list for Building 1 but next to last on the list when he transferred to Building 2 (A. 24, 68, 75, 103-104).

The only stores clerk in Stores Progress with less seniority than Hardison was Bill Wyatt, whose vacation was scheduled in March 1969 (A. 7). By operation of seniority, Hardison was scheduled to replace Wyatt and thus to work on Saturday, March 8 (A. 24). He was the only stores clerk in his section scheduled to work that day (A. 125, 133, 156). TWA employed more than 200 other stores clerks who, seniority aside, were qualified to substitute for Wyatt on Saturdays (A. 133-134, 140, 152-153, 155-156).

Kussmann learned that Hardison was scheduled to work on March 8 and scheduled a meeting for March 6 with him and his union steward, James Tinder (A. 31, 69, 72, 76, 109). Several means of accommodation were discussed at the meeting. Kussmann was unwilling simply to give Hardison the Saturday off since that would "deprive me of coverage on the day that I needed a man to work" (A. 127-128, 146). Kussmann was willing to agree to Hardison's changing shifts within his section, but Tinder would agree to this only if it could be accomplished within the seniority provisions of the

collective bargaining agreement, *i.e.*, only if the shift sought by Hardison was put up for bid and no one senior to Hardison wished to take it (A. 70, 77, 84).

Hardison mentioned that he knew of a man on the graveyard shift of his section who disliked working on that shift and stated that it "would be great" if he could change shifts with him (A. 70, 83). Tinder stated that since Hardison had less seniority than this man, he could not "bump" into his position (A. 70, 84, 110).

Hardison also suggested a transfer to another section, preferably back to Building No. 1, where he had enough seniority to have weekends off, at least on the graveyard shift (A. 70-71, 77, 110). Tinder objected to this proposal also, because of seniority and because of a requirement in the union's constitution that Hardison work at least six months in his present position (A. 70-71, 84, 110).

Hardison also offered to work six days per week, without overtime pay, to be able to have his Sabbath off (A. 71). Tinder opposed this because the collective bargaining agreement required the payment of overtime wages for hours worked in excess of 40 per week (A. 71). The meeting ended without a resolution of Hardison's problem.

That same day, Hardison also met with his immediate supervisor, John Nicholson, who refused Hardison's request to be excused on March 8 for "personal business" (A. 31, 33). On March 8 Hardison called in to the "day storekeeper" and asked for the day off for personal reasons. When this request was denied, Hardison failed to report for work (A. 31-32, 112).

Hardison was also scheduled to work the two following Saturdays, March 15 and 22, 1969 (A. 31-33, 69). A few days before March 15, he asked R. C. Stewart, then substituting as foreman for Nicholson, if he could be excused from work on March 15. This request was refused, but Hardison did not report for work that day (A. 31, 32).

On March 21 Hardison met with W. J. Butcher, Supervisor of Stores Planning and Control, and steward James Tinder concerning his absences (A. 32, 72). As a result of the meeting, Butcher wrote Hardison that a discharge hearing would be scheduled if he failed to report for work on Saturday, March 22, without an acceptable justification (A. 32-33). Respondent failed to report for work on March 22 (A. 31, 34).[2]

After being notified that a discharge hearing had been scheduled, Hardison met with members of the Union Grievance Committee (A. 34, 77-78, 168-172). The Committee decided to argue that discharge was too severe a penalty and to seek reversal of any adverse decision at a higher level (A. 168, 169). The possibility of the union's waiving the seniority requirements was not discussed (A. 93). Hardison told the members of the Grievance Committee to use their best judgment as to the conduct of his defense (A. 169, 172).

After the meeting, Hardison changed to the "twilight shift" (3:30 p.m. to 11:00 p.m.) of his section in an effort to resolve his problem (A. 130), but at sundown on Friday, March 28, before his shift was over, Hardison left work (A. 129, 130, 171).

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[2] As a result of Hardison's absences on March 8, 15 and 22, employees from other sections were required to work in his place (A. 125, 162).

The discharge hearing was held on March 31, 1969 (A. 34, 173). Hardison was present but did not testify (A. 94, 173). The union argued, on Hardison's behalf, that TWA had committed certain procedural errors that made any discipline improper and that, in any event, discharge was too severe a penalty (A. 34).

Hardison was found insubordinate for refusing to work on March 8, 15, and 22, 1969, and his employment was terminated on April 2, 1969 (A. 34-35, 94, 95). Union officials thereafter attempted to reach him to pursue the matter further, but without success (A. 35-36, 179, 181-182). Hardison did not file a grievance with the Union Grievance Committee against either TWA or the union (A. 78, 93, 132).

At no time during the discussions concerning the conflict between Hardison's religion and his work schedule did any TWA or union representative raise the question whether the Civil Rights Act might be applicable, and there was no evidence that any person involved in the discussions was aware of its possible pertinence (Tr. 461).

2. Hardison filed a complaint of religious discrimination with the Equal Employment Opportunity Commission in August 1969 (A. 7-9, 37). After complying with the appropriate administrative procedures, the Commission gave Hardison a "Notice of Right to Sue Letter" on January 11, 1972 (A. 5, 17). He filed this action in the United States District Court for the Western District of Missouri on February 10, 1972 (A. 3-9).

The complaint charged that TWA violated Title VII of the Civil Rights Act of 1964, 78 Stat. 241, 253, as

amended, 42 U.S.C. 2000e *et seq.*, by discharging Hardison on the basis of his religion (A. 4). The complaint further alleged that petitioner unions violated Title VII by "failing to negotiate, assist, or correct the discriminatory policies of defendant Trans World Airlines, Inc.," and by "cooperat[ing with], act[ing] in concert [with,] and assist[ing]" TWA in its discharge of Hardison (A. 4-5). Hardison sought permanent injunctions against TWA and the unions, an award of all lost wages and benefits, and attorney's fees (A. 5-6).

3. In its memorandum and order of May 15, 1974 (A. 183-209), the district court found for TWA and the union. The court ruled that a 1967 EEOC Guideline, 29 C.F.R. 1605.1, see footnote 4, *infra,* requiring reasonable accommodation to employees' religious practices, was consistent with Title VII of the 1964 Civil Rights Act (A. 197-201), that it did not violate the Establishment Clause of the First Amendment (A. 201-202), and that it applied to the union as well as to TWA (A. 188-189). The court concluded, however, that "to require the union to ignore seniority in every case in which an employee with lesser seniority can observe his Sabbath only by changing shifts with a more senior employee would work an undue hardship on the union" (A. 189), that 42 U.S.C. 2000e-2(h)[3] "if not absolutely

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[3] That section provides:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system • • • provided that such differences are not the result of an intention to discriminate because of • • • religion • • •.

controlling, at least indicates that Congress did not intend that unions or employers be required to take actions that could impinge upon bona fide seniority systems" (A. 191), and that the facts did not sustain respondent's charge "that the unions failed to properly process his grievance" (A. 193).

The court held that "TWA's actions with respect to working out [Hardison's] religious observance was [sic] a reasonable accommodation by TWA and that any further action by TWA would have worked an undue hardship on the conduct of its business" (A. 205). The court ruled that TWA had "take[n] appropriate action to accommodate" by holding "several meetings with [Hardison] in which it attempted to find a solution to [his] problems", "accommodat[ing] [his] observance of his special religious holidays", "authoriz[ing] the union steward to search for someone who would swap shifts", and "attempt[ing] to work out [his] problems in ways that had proved successful in similar cases" (A. 207-208).

In concluding that "further accommodation by TWA would have worked an undue hardship on the conduct of its business," the court stated (A. 208):

> TWA had two choices for further accommodation: (1) to simply allow [Hardison] to take his time off and attempt to replace him; or (2) to force another employee to change shifts.
>
> * * * To replace him with an employee from another area would leave that employee's work crew short. To replace him with an employee who

> was not regularly scheduled to work at that time would have caused TWA to pay premium wages. Both of these solutions would have created an undue burden on the conduct of TWA's business.

The court also ruled that "it would have been an undue hardship for TWA to have changed [Hardison's] shift in violation of the seniority provision of the labor-management contract" (A. 209). Accordingly it ordered that judgment be entered in favor of all the petitioners (A. 209).

4. The court of appeals affirmed the judgment in favor of the unions, but reversed the judgment in favor of TWA and remanded the case for the determination of appropriate relief (A. 246-266). The court agreed with the district court that EEOC Guideline 29 C.F.R. 1605.1 was consistent with Title VII (A. 253-254) and the Establishment Clause (A. 264-266), and that it applied to the unions as well as to TWA (A. 262).

The court observed that Hardison had made "a consistent effort * * * to acquaint TWA with his religious conversion and the effect of that commitment upon his ability to work during his Sabbath period and certain other religious holidays" (A. 254-255). It noted that Hardison "was willing to work long weeks or short weeks provided his religious obligation to abstain from work on his Sabbath could be met" and that "[h]e even transferred to the twilight shift in order to minimize the impact of his absence on the company" (A. 255).

The court ruled that TWA could have reasonably

accommodated Hardison without undue hardship in several ways. First, "[w]ithin the framework of the collective bargaining agreement, TWA could have permitted Hardison to work a four-day week" (A. 256). Another alternative "within the framework of the collective bargaining agreement was for TWA to fill Hardison's Sabbath shift from other available personnel. This could be accomplished by holding a worker over from the last shift, calling a worker in early, or, more logically, assigning a worker from the pool of 200 employees qualified to do the work" (A. 257-258). A third alternative, the court ruled, was "a swap between Hardison and another employee, either for another shift or for the Sabbath days" (A. 259; footnote omitted).

The court of appeals observed that it was not required to determine "[t]he proper relationship between a bona fide seniority system and the requirement of reasonable accommodation" (A. 259), because "TWA did not seek and the union therefore did not refuse to entertain a possible variance [to the collective bargaining agreement]" (A. 260-261; footnote omitted). "TWA did not even seek to find volunteers within the seniority system. It left that task to the union steward, who likewise did nothing" (A. 261).

The court noted that the district court's conclusions about the liability of the union "are not directly challenged upon appeal[;] the briefs and oral argument are directed to the breach of duty by TWA" (A. 263). Accordingly, the court ruled that it was "not required to reach the substantive correctness of such conclusions" (A. 263).

INTRODUCTION AND SUMMARY OF ARGUMENT

Section 703(a)(1) of the Civil Rights Act of 1964, 78 Stat. 255, 42 U.S.C. 2000e-2(a)(1), provides that it is an unlawful employment practice for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's * * * religion * * *." Section 701(j) of that Act, as added by the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 42 U.S.C. (Supp. V) 2000e(j), defines "religion" to include "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." The Equal Employment Opportunity Commission's Guidelines on Discrimination Because of Religion, in effect since 1967, embody a similar standard.[4]

The parties do not dispute that TWA discharged Hardison because of his refusal to work on Saturdays and that his refusal to work on Saturdays is a sincere "religious observance and practice" within the meaning of Section 701(j) of the Act.[5] Whether TWA com-

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[4] The Guidelines impose on an employer the obligation "to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business." 29 C.F.R. 1605.1(b).

[5] Hardison was discharged in April 1969; he filed the complaint

mitted an unlawful employment practice—that is, whether it discharged Hardison because of his "religion"—thus turns on whether the company demonstrated that it was unable reasonably to accommodate

in this case on February 10, 1972. Both these events preceded the enactment of Section 701(j) on March 24, 1972. TWA contends that "no duty to accommodate ever existed in this case," because Section 701(j) "can only be given a prospective application" (Br. 23 n. 9). However, neither of the petitions for certiorari specifically presented the question whether the reasonable accommodation requirement, if constitutional, applied in this case, and we doubt that the question is fairly comprised in those that were presented in the petitions. See Rule 23(1)(c) of the Rules of this Court.

In any event, the 1967 EEOC Guideline requiring reasonable accommodation was in effect when Hardison was discharged. The duty to accommodate defined in the Guideline is implicit in Title VII's basic prohibition of discrimination against employees on account of religion. See, *e.g.*, *Cummins* v. *Parker Seal Co.*, 516 F. 2d 544, 547 (C.A. 6), affirmed by an equally divided Court, No. 75–478, decided November 2, 1976; *Reid* v. *Memphis Publishing Co.*, 468 F. 2d 346, 351 (C.A. 6); *Riley* v. *Bendix Corp.*, 464 F. 2d 1113, 1116–1117 (C.A. 5). But see *Reid* v. *Memphis Publishing Co.*, 521 F. 2d 512, 519–520 (C.A. 6); *Dewey* v. *Reynolds Metals Co.*, 429 F. 2d 324, 331 n. 1, 334, 335 (C.A. 6), affirmed by an equally divided Court, 402 U.S. 689; *Kettell* v. *Johnson & Johnson*, 337 F. Supp. 892, 895 (E.D. Ark.). TWA was therefore under an obligation reasonably to accommodate Hardison's religious practice.

Moreover, "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Cort* v. *Ash*, 422 U.S. 66, 77, quoting *Bradley* v. *Richmond School Board*, 416 U.S. 696, 711. See also *Thorpe* v. *Housing Authority of the City of Durham*, 393 U.S. 268, 281–283; *United States* v. *The Schooner Peggy*, 1 Cranch 103, 110. There is no "manifest injustice" in applying Section 701(j) in this case because the statute merely codified the pre-existing EEOC Guideline. Nor does the statute or its legislative history indicate that Section 701(j) should not be applied in cases such as this. In these circumstances, the constitutionality and application of both Section 701(j) and the Guideline are properly before the Court.

Hardison's Saturday absences without undue hardship in the conduct of its business.

This issue was, in our view, correctly resolved by the court of appeals, which concluded, after a thorough review of the record, that TWA did not make the required showing and that its discharge of Hardison therefore violated the Act's prohibition against religious discrimination.

TWA could have reasonably accommodated respondent's religious practice without violating the collective bargaining agreement in several ways. It could have simply excused him without pay from working those few times per year when he would be required to work Saturdays. It could also have allowed him to take a day's leave. It could have sought volunteers willing to substitute for him on Saturdays, or to exchange shifts with him on a permanent basis, from among more than 200 TWA employees capable of performing his functions. It could have enlisted the aid of the Union Relief Committee. TWA took none of these actions. None would have violated the collective bargaining agreement. None would have caused it undue hardship.

Even if accommodating Hardison's religious practice would have required TWA to breach the seniority provisions of the collective bargaining agreement—and we believe it would not—that would not justify TWA's failure to make a reasonable accommodation. Such provisions do not confer indefeasible rights upon employees. Rather, employee expectations arising from such provisions may be modified by statutes such as Title VII that further the public interest. TWA has not shown that granting Hardison a variance from the

collective bargaining agreement would have created an undue hardship upon the operation of its business.

II

It follows that Hardison is entitled to appropriate relief under the Act, unless, as TWA and the Unions alternatively argue, the Act and the EEOC Guidelines, as interpreted by the court of appeals, violate the Establishment Clause of the First Amendment by imposing on the company an obligation reasonably to accommodate an employee's religious observance or practice.

A. If Congress may validly proscribe sophisticated as well as obvious means of religiously-discriminatory employment practices by private employers, and if, as this Court has held, Title VII is directed to the consequences and not merely the motivation of employment practices, then it follows that the reasonable accommodation requirement does not violate the Establishment Clause. For it does no more than state a standard by which to determine whether, in a particular case, an employment practice with religiously-discriminatory consequences is justified by substantial business need. An employer's obligation reasonably to accommodate his employees' religious needs derives from his basic obligation to avoid religious discrimination in employment.

B. This Court's Establishment Clause decisions make clear that a government employer could properly make reasonable accommodations to those of its employees whose religious beliefs or observances conflict with normal work schedules, even if the schedules of other

employees might have to be adjusted as a consequence. That would reflect a permissible "neutrality in the face of religious differences" and would not "serve to abridge any other person's religious liberties" (*Sherbert* v. *Verner*, 374 U.S. 398, 409). It is not an establishment of religion for public institutions to make "adjustments of their schedules to accommodate the religious needs of the people" (*Zorach* v. *Clauson*, 343 U.S. 306, 315).

It is no more an establishment of religion for the government to require private employers to do the same thing. In neither case is there any departure from the principle of neutrality. Congress may validly seek to accommodate free exercise values by eliminating unnecessary burdens on the practice of religion and avoidable clashes with the dictates of conscience.

C. The reasonable accommodation requirement satisfies the tripartite test devised by this Court for determining whether a challenged law violates the Establishment Clause: it reflects a secular purpose, it has a primary effect that neither advances nor inhibits religion, and it avoids excessive government entanglement with religion.

The purpose and effect of the reasonable accommodation requirement are the same as those of Title VII as a whole—"to achieve equality of employment opportunities" and to "remov[e] * * * unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of * * * impermissible" criteria. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 429, 431. Congress has properly determined that an individual's religion, as well as his race, nationality,

and sex, should not affect his employment opportunities except in the rare instance when it significantly affects his job qualifications.

The reasonable accommodation requirement represents a permissible legislative effort—secular in purpose and effect—to identify the circumstances in which it may fairly be said that an individual's religious practices are sufficiently relevant to his job qualifications that they may properly be taken into account in connection with an employment practice. The requirement's primary effect neither advances nor inhibits religion; rather, it removes an artificial barrier to equal employment opportunity by making religion an "irrelevant" employment criterion (*Griggs, supra,* 401 U.S. at 436), except to the limited extent that a person's religious practice significantly and demonstrably affects the employer's business.

The requirement entails no substantial government entanglement with religion. The central factual inquiry under the statute—whether the employer can reasonably accommodate an employee's religious practice without undue hardship—implicates industrial, not religious, considerations, and any unavoidable "entanglement" that may occasionally result when a religion's practices or an employee's sincerity is put in issue is likely to be minimal and is essentially no different from that mandated in another context by this Court's decision in *Sherbert* v. *Verner, supra.*

In sum, the reasonable accommodation requirement itself represents a reasonable accommodation of the values embodied in the Free Exercise and Establishment Clauses. Although the legislative solution is not compelled by either clause, neither is it forbidden.

ARGUMENT

I

NEITHER TWA NOR THE UNION HAS DEMONSTRATED THAT IT IS UNABLE REASONABLY TO ACCOMMODATE HARDISON'S RELIGIOUS PRACTICE WITHOUT UNDUE HARDSHIP ON THE CONDUCT OF ITS BUSINESS

Upon a full review of the record, the court of appeals reversed the district court's conclusion that TWA had made a reasonable effort to accommodate Hardison's religious practice and that further effort to accommodate would have created undue hardship on the conduct of its business. The court of appeals relied "heavily" on the findings of the district court (A. 247) but concluded that, even within the framework of the collective bargaining agreement, TWA could have taken further steps to accommodate his religious practices without incurring undue hardship. This conclusion is correct.[6]

Moreover, while the duty of reasonable accommodation does not, in our view, require an employer to im-

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[6] Both the district court (A. 186–188) and the court of appeals (A. 261–262) held that the union no less than the employer has a duty to accommodate; as the court of appeals said, "[t]he union may be held liable if it purposefully acts or refuses to act in a manner which prevents or obstructs a reasonable accommodation by the employer so as to cause the employer to discriminate" (A. 262). Although the union argues that this duty does not obligate it to override seniority rights, and that any construction of the statute to require such a result would violate the Establishment Clause, it does not challenge the holding below that the union has a duty to accommodate.

plement an accommodation that violates the terms of a bona fide collective bargaining agreement if an accommodation that does not do so is possible, neither can the employer rely solely on the collective bargaining agreement in refusing to accommodate. To reject as *per se* unreasonable those accommodations which conflict with the collective bargaining agreement would give a private agreement a status superior to the federal law. Therefore, if a reasonable accommodation without undue hardship could not be reached in this case within the confines of the seniority system, Title VII obliges the parties to adjust those rules in an effort to reach such an accommodation.

Perhaps, in some future case, seniority rules would need to be bent so much that the hardship could properly be called "undue." But this is not that case. Since Hardison was on a Monday-to-Friday day shift, he would normally be required to work only a few Saturdays per year, on those occasions when employee Wyatt was sick or on vacation, or when emergencies occurred. Moreover, Hardison was willing to transfer back to his former unit, where his higher standing on the seniority ladder would have reduced even further his vulnerability to substitute for others on his Sabbath. But the opposition of TWA and the union to each of several possible solutions prevented an accommodation and led to Hardison's discharge.

A. ACCOMMODATIONS WITHIN THE FRAMEWORK OF THE COLLECTIVE BARGAINING AGREEMENT WERE REASONABLY AVAILABLE.

Within the framework of the collective bargaining agreement, TWA could have accommodated Hardison's

religious beliefs by simply allowing him to take a day's leave or excusing him, without pay, from Saturday work. The union had no objection to this solution (A. 115), but TWA's Kussmann objected, stating that such an accommodation would mean "usurping seniority in another section that would have to cover * * * or I would have to depend on overtime, which could not be compulsory in this case, and I might not get it" (A. 128). But it is not self-evident that moving to Hardison's slot an employee who would normally work Saturday in another section would usurp anyone's seniority rights or necessarily cost TWA any overtime. While such a move would create a temporary vacancy elsewhere, there was no showing below that such a vacancy could not be tolerated for an occasional Saturday.

With respect to "compulsory" overtime, there is no reason to believe that TWA would have been any less able to call in an employee for Hardison's absence due to religious observance than it would have been had Hardison been absent due to illness. The problem seems to have been not one of obtaining a worker, but of paying him overtime. But, as the court of appeals correctly recognized, "[t]he regulation does not preclude some cost to the employer anymore than it precludes some degree of inconvenience to effect a reasonable accommodation" (A. 258). See also *Ward* v. *Allegheny Ludlum Steel Corp.*, 397 F. Supp. 375, 377 (W.D. Pa.). Since a substitute for Hardison would be required only a few times per year, the additional costs incurred by TWA for overtime wages, if any, would not be great.

Without violating the collective bargaining agree-

ment, the company also could have avoided any perceived problems of "compulsory" overtime by seeking volunteers from within the Stores Department. There were more than 200 stores clerks besides Hardison capable of working in Wyatt's place, most of whom were not ordinarily scheduled to work Saturdays (A. 155-156). Given this number of qualified stores clerks, it is reasonable to suppose that one volunteer might well be forthcoming on each of the few times per year that accommodation would be required.

Indeed, in at least one respect it is ordinary company policy to seek out volunteers to work certain shifts. In arranging for sufficient personnel to work on the "contract holidays" (A. 216), such as Christmas, the company would notify the union steward of the number of persons required to work on each shift. The steward would then ask for volunteers to fill the positions. Only if there were not enough volunteers would the steward attempt to fill the positions by reverse seniority (A. 137-139). Given such flexibility of operation, TWA "cannot be heard to plead that its hands are tied by a seniority agreement." *Shaffield* v. *Northrop Worldwide Aircraft Services, Inc.*, 373 F. Supp. 937, 942 (M.D. Ala.).

Furthermore, TWA similarly made no effort to bring Hardison's situation to the attention of the Union Relief Committee, "an informal organization of union members through which the union and TWA were normally able to avoid confrontations over seniority variances in special situations" (A. 261). The Committee in the past had arranged temporary transfers outside strict seniority requirements (A. 144). At the

time of trial, the Committee had requested and obtained special relief for another TWA employee (A. 131). The Committee, in at least one instance, had even arranged a permanent transfer out of seniority (A. 144). But even temporary relief through the Committee may have enabled Hardison to keep his job, for as he accrued additional seniority, he would likely have been able, through bidding rights, to avoid work on his Sabbath.

B. ACCOMMODATIONS REQUIRING AN ADJUSTMENT IN THE SENIORITY SYSTEM WERE ALSO REASONABLY AVAILABLE.

Certain accommodations would have necessitated a reasonable adjustment of seniority rules, but the Union was as unyielding in refusing to allow these accommodations as TWA was in refusing to allow accommodations not requiring such an adjustment. The simplest solution, and one that Hardison was prepared to make, was to switch shifts within Building 2 for the period at issue. Steward Tinder said that could be done only if the shift sought by Hardison was put up for bid and no one senior to Hardison took it (A. 70, 77, 84). But the seniority system would not be seriously compromised by such a temporary adjustment in bidding rights in order to fulfill a statutory obligation. Moreover, there is no showing that the union ever took any step to put the position up for bid in an effort to accommodate Hardison.

Hardison also proposed a transfer back to Building 1, where he would have had enough seniority on the graveyard shift to avoid weekend work. The union also rejected this proposal, at least in part because of a union rule requiring members to stay in one job at least

six months (A. 70-71). But there is no showing that waiver of that rule would have infringed the seniority of any other employee. Waiver of the six-month rule in this instance would have allowed Hardison to observe the Sabbath and would have caused the union little if any inconvenience and certainly no "hardship."

There was similar union opposition to Hardison's proposal, evidently acceptable to TWA, that Hardison work six days a week without being paid overtime for the sixth day. The union rejected this proposal as in violation of the collective bargaining agreement requirement that work over 40 hours per week be paid at overtime rates (A. 71). There was no exploration of whether a waiver of this rule could lead to an accommodation. Again, the collective bargaining agreement was relied upon as a self-sufficient reason for rejection of Hardison's request. But the mere terms of a private contract are not in themselves sufficient to defeat Hardison's statutory rights.

Moreover, TWA cannot fulfill its statutory obligation merely by being a passive observer willing to agree to any exchange of shifts or sections that Hardison and the union could work out within the seniority system.[7] Without taking steps to ensure that the union actually made appropriate arrangements, TWA fell short of its duty under the EEOC guidelines "to *make* reasonable accommodations to the religious needs of employees"

[7] Kussmann, the TWA official most familiar with Hardison's problem, testified he did not know why an exchange of shifts or sections was not made. He could not recall whether Tinder "refused the[se] suggestions • • •, or whether or not he indicated that he would go out and see" (A. 127).

(emphasis added). The burden of making reasonable accommodation—including the obligation to seek substitutes if necessary—is on the employer, not the employee.

Similarly, Section 701(j) requires the employer, not the employee, to demonstrate that the employer is unable reasonably to accommodate an employee's religious practices without undue hardship. By implication, the employer also has an obligation to implement a reasonable accommodation, including providing substitute workers, if it can do so without undue hardship. In addition to the court below, several other federal courts have recognized that the burden of providing substitutes rests with the employer, not the employee. See, *e.g., Draper* v. *United States Pipe & Foundry Co.,* 527 F.2d 515, 520-521 (C.A. 6); *Cummins* v. *Parker Seal Co., supra,* 516 F.2d at 550; *Shaffield* v. *Northrop Worldwide Aircraft Services, Inc., supra,* 373 F. Supp. at 941-942; *Claybaugh* v. *Pacific Northwest Bell Telephone Co.,* 355 F. Supp. 1, 5 (D. Ore.). But see *United States* v. *City of Albuquerque,* 545 F.2d 110, 114 (C.A. 10), petition for certiorari pending, No. 76-1191 (filed February 28, 1977); *Dewey* v. *Reynolds Metals Co., supra,* 429 F.2d at 330-331.[8]

Nor could TWA relieve itself of its affirmative obligation to accommodate by simply leaving to the union

[8] The legislative history of Section 701(j) (see pp. 46–49, *infra*) shows congressional disagreement with the result reached in *Dewey* and, by implication, disagreement with the suggestion therein that the employer's allowing Dewey to find a replacement for his Sabbath hours constituted a reasonable accommodation under the 1967 EEOC Guideline and that it would have been an undue hardship to require the employer to attempt to find such replacements.

the task of making the necessary arrangements and never trying to find out what action, if any, was being taken. If an employer elects to rely upon an employee's union to implement a reasonable accommodation, it must be prepared to accept the consequences of the union's failure to act.

Although TWA officials testified they were concerned that giving Hardison a variance would irritate other union members, the court of appeals correctly found that there is "no evidence to support such an inference" and that "such irritation, if real, would [not] have been an undue hardship on the employer's business" (A. 261). As this Court observed in an analogous context, "[i]f relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed." *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 775, quoting from *United States* v. *Bethlehem Steel Corp.*, 446 F.2d 652, 663 (C.A. 2).

The observation of the court of appeals in *Cummins* v. *Parker Seal Co., supra,* 516 F.2d at 550, is apt here: "The objections and complaints of fellow employees, in and of themselves, do not constitute undue hardship in the conduct of an employer's business. If employees are disgruntled because an employer accommodates its work rules to the religious needs of one employee, under EEOC Regulation 1605 and [42 U.S.C. (Supp. V)] § 2000e(j) such grumbling must yield to the single employee's right to practice his religion." In *Cummins,*

the complaints were "mild and infrequent." *Ibid.* Here, they were nonexistent.

Since Hardison was not granted any special relief from the seniority rule, any hardship that TWA might have thereby incurred is necessarily hypothetical. The Court should be "somewhat skeptical of hypothetical hardships that an employer thinks might be caused by an accommodation that never has been put into practice. The employer is on stronger ground when he has attempted various methods of accommodation and can point to hardships that actually resulted." *Draper* v. *United States Pipe & Foundry Co., supra,* 527 F.2d at 520. On this record, TWA has failed to demonstrate facts sufficient to warrant an inference that a variance for Hardison would have created an undue hardship.

Granting Hardison a variance from the seniority provisions of the collective bargaining agreement would not have seriously disrupted the normal operation of the seniority system. Other employees would merely have been subject to reassignment, in accordance with contractual seniority rights among themselves, for the four Saturdays involved—just as they would have been had Hardison been unavailable to work on those days because of illness. Nor would such a variance for Hardison deprive other TWA employees of any indefeasible rights bestowed by the collective agreement.

This Court has long held that employee expectations arising from a seniority system agreement may be modified by statutes furthering a strong public policy interest. *Franks* v. *Bowman Transportation Co., supra,* 424 U.S. at 778. See also *Tilton* v. *Missouri Pacific Railroad Co.*, 376 U.S. 169; *Fishgold* v. *Sullivan Dry-*

dock & Repair Corp., 328 U.S. 275.[9] "[C]laims under Title VII involve the vindication of a major public interest * * *." Section-By-Section Analysis of H.R. 1746, accompanying the Equal Employment Opportunity Act of 1972—Conference Report, 118 Cong. Rec. 7166, 7168 (1972); *Franks* v. *Bowman Transportation Co., supra,* 424 U.S. at 778, n. 40. Congress has determined, by passage of Section 701(j), that it is in the national interest that employers and unions accept such adjustments in contractual seniority rights as will enable Sabbatarians to meet their religious obligations, where this can be done without undue hardship.

TWA argues that Section 703(h), 42 U.S.C. 2000e-2(h), see footnote 3, *supra,* absolves it from liability under Title VII. But, as the Court observed in *Franks, supra,* 424 U.S. at 761, "the thrust of the section is directed toward defining what is and what is not an illegal discriminatory practice in instances in which the post-Act operation of a seniority system is challenged as perpetuating the effects of discrimination occurring prior to the effective date of the Act"—hardly the case here. The Act would be self-defeating if that provision were interpreted to immunize from the Act's prohibitions particular applications of otherwise valid seniority systems that prevent the reasonable accommodations to employee religious obligations mandated by Congress.

[9] Similarly, in *Ford Motor Co.* v. *Huffman,* 345 U.S. 330, the Court ruled that a collective bargaining agreement may enhance the seniority status of certain employees beyond that required by statute, even though this will diminish the seniority status of other employees under the previous collective bargaining agreement.

TWA contends that the court of appeals violated Rule 52(a), Fed. R. Civ. P., "by trying the issues of reasonable accommodation and undue hardship *de novo*" (Br. 20, 46-60). However, it is evident that the court of appeals "re[lied] heavily upon the findings of the District Court" (A. 247), as it said it did, and that its reversal of the district court was based not on any new or different findings of fact but on a different conclusion as to TWA's legal duty under the facts found by the district court. In essence, it found that the district court "applied an erroneous legal standard," *Kelley* v. *Southern Pacific Co.,* 419 U.S. 318, 323, in holding, on the facts it found, that TWA could not reasonably accommodate Hardison without undue hardship. Indeed, the district court explicitly recognized that the "relevant factual circumstances of this case are not substantially disputed" and that the disputes that did exist "are for the most part irrelevant" (A. 185).[10]

[10] During trial, the court repeatedly adverted to the absence of factual dispute, remarking at one point to all counsel that "[t]his case is unique in that your documentary evidence contains the quite full story" (Tr. 200). As the trial grew longer, the court expressed some exasperation that "[w]e have spent three days here when it should have taken about three hours to prepare that stipulation, because I don't think there is any possible dispute about those factual circumstances" (Tr. 411). At the close of evidence, the court said that it "has been obvious since the start of this case * * * that there are no fundamental disputed questions of fact in this case, really" (Tr. 464). Much of the case was set forth in a lengthy stipulation (A. 22–56; see A. 56–64) which the district court characterized as "very, very full" (Tr. 5). TWA's reliance on the trial court's ability to judge the demeanor of the witnesses (Br. 59–60) thus has little pertinence to this case, in which the trial court itself found virtually the entire case, on all sides, capable of stipulation (Tr. 411).

Because the basic facts were not in dispute, the court of appeals was in as good a position as the district court to decide the statutory issues, *i.e.*, whether TWA had reasonably accommodated Hardison and whether implementation of the suggested accommodations would have necessarily caused it undue hardship. Since the district court's conclusions on these questions were based upon an erroneous view of the controlling legal principles, the "clearly erroneous" standard of Rule 52(a) does not apply. *Kelley* v. *Southern Pacific Co.*, *supra*, 419 U.S. at 323. TWA has pointed to no instance where the court of appeals arrogated the fact-finding process to itself. In merely drawing different legal conclusions from the facts found by the district court, that court acted well within the proper bounds of appellate review.

II

THE REASONABLE ACCOMMODATION REQUIREMENT DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT

A. THE POWER OF CONGRESS, CONSISTENT WITH THE FIRST AMENDMENT, TO PROHIBIT RELIGIOUSLY DISCRIMINATORY EMPLOYMENT PRACTICES BY PRIVATE EMPLOYERS COMPREHENDS THE AUTHORITY REASONABLY TO DEFINE THE CONDUCT THAT CONSTITUTES SUCH DISCRIMINATION

Our Establishment Clause analysis begins with the premise that Title VII's basic prohibition against religiously discriminatory employment practices by private employers is a proper exercise of congressional

power under the Commerce Clause [11] and is not a "law respecting an establishment of religion." Congress may validly prohibit "sophisticated as well as simple-minded modes of discrimination." *Lane* v. *Wilson*, 307 U.S. 268, 275. And it is settled that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation"; the Act's thrust is directed "to the *consequences* of employment practices, not simply the motivation" (*Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431, 432; emphasis in original).

It follows that the reasonable accommodation provision at issue here does not violate the Establishment Clause, for it does no more than define "religion" in a way reasonably calculated to ensure that even those employment practices whose religiously-discriminatory consequences are subtle rather than obvious are effectively covered by the Act's basic prohibition.

Section 703(a)(1) makes it unlawful for an employer to discharge an employee "because of such individual's * * * religion." It would be the most obvious violation of that proscription were an employer to discharge an employee simply because he found the employee's religious beliefs personally repugnant. It would also be an obvious violation to base a discharge on a personal distaste for the employee's religious practices, if the practices were conducted out-

[11] See 110 Cong. Rec. 1528, 7207–7212 (1964). Cf. *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241; *Katzenbach* v. *McClung*, 379 U.S. 294.

side the employment relationship and did not affect in any way the employee's job performance. Petitioners would doubtless take no issue with these propositions.

The inquiry becomes more difficult when the employee's religious beliefs dictate a form of observance that would interfere to some degree with the normal performance of his job duties. It seems clear enough, to take the most extreme example, that when an employee refuses to work at all because his religious beliefs forbid it, the employer's decision to discharge the employee would not constitute discrimination on the basis of the employee's religion. In that case there would be no means of accommodating the employee's religious observance while still maintaining the employment relationship.

At the other end of the spectrum are religious observances that may occasion the most insignificant interference with job performance. An employee's beliefs may require, for example, that he interrupt his work once or twice a day for a few moments of prayer or meditation. Common sense tells us that to discharge an employee because of such momentary interruptions may be viewed as having religiously-discriminatory consequences, unless, in the particular employment context, even the briefest pause for meditation necessarily produces a work disruption sufficiently substantial to justify the conclusion that the employer's insistence on abandonment of the practice has "a manifest relationship to the employment in question" (*Griggs* v. *Duke Power Co., supra,* 401 U.S. at 432).

Petitioners appear to argue (Br. for TWA 23, 28, 46; Br. for Unions 61, 70-71) that even the most insignificant conflict can justify a discharge and that Congress is powerless to prevent it even when only the most minimal accommodation would be required. If so, their position is untenable. For if Congress may properly prohibit subtle as well as obvious religious discrimination in employment, and if (as *Griggs* v. *Duke Power Co.* teaches) Congress may properly focus on the discriminatory consequences of employment practices and not merely on instances of intentional discrimination, then there is no reason why its power must come to an abrupt end once it may be said that the employee's religious practices affect job-related work schedules.

If the conflict between a religious observance and work schedules is minimal or can easily be avoided, Congress may validly proscribe, as religiously discriminatory, a discharge or other adverse employment action on the basis of that religious observance. To deny that Congress has that power is to say that the First Amendment sanctions religious discrimination in private employment so long as the religion is manifested, no matter how insubstantially, in work-related conduct. If this is petitioners' position, it should be rejected.

If, instead, petitioners are prepared to concede that some accommodation may validly be required with respect to some religious practices, then on what basis do they challenge the formulation chosen by Congress? One may imagine a broad spectrum of work-related religious observances, from a refusal to work at all to a momentary pause for silent prayer. The legislative task is to distinguish among those practices that are,

and those that are not, sufficiently disruptive of the employment relationship to warrant the employee's discharge from employment. If a practice is not sufficiently disruptive—that is, if the conflict is, in context, relatively insubstantial—then a discharge on that basis may properly be prohibited on the ground that its religiously discriminatory consequences are not justified by any substantial business need. Cf. *Griggs* v. *Duke Power Co., supra,* 401 U.S. at 431-432.

In formulating a standard for differentiating between permissible and impermissible employment practices based on work-related religious observances, Congress drew upon the criteria of reasonableness—deeply entrenched in our legal tradition—and business need—the "touchstone" of Title VII (*Griggs, supra,* 401 U.S. at 431). The 1972 amendment defined "religion" to include "all aspects of religious observance and practice * * * unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. (Supp. V) 2000e(j).

Reasonable persons may perhaps disagree over whether this is the best formulation of the standard—or indeed over whether it was wise of Congress to legislate the standard at all (or to authorize its formulation by the Equal Employment Opportunity Commission) rather than leaving the matter for development by the courts. But those questions are properly within the scope of congressional authority to resolve.

Unless the Establishment Clause altogether bars Congress from protecting private employees from discharges based upon religious observances, even when the observances bear only insubstantially upon work performance, then Congress has the constitutional authority reasonably to determine the circumstances in which such a discharge will be permitted.

Any such determination, of course, will have the effect of imposing certain obligations on employers to adjust their practices to avoid religiously-discriminatory consequences. But if, as here, the congressional standard is reasonable, the Establishment Clause is no more violated by the imposition of such an obligation than it is by Title VII's imposition of the fundamental duty to avoid religious discrimination in employment. The obligation to accommodate is no more than a reasonable and proper application of the obligation to avoid religious discrimination in employment generally.

B. THE REASONABLE ACCOMMODATION PROVISION PROPERLY PROTECTS INDIVIDUALS FROM THE IMPOSITION OF UNNECESSARY EMPLOYMENT BARRIERS THAT WOULD OTHERWISE BURDEN THE EXERCISE OF THEIR RELIGION; IT REQUIRES NOTHING MORE THAN NEUTRALITY IN THE FACE OF RELIGIOUS DIFFERENCES

Petitioners' Establishment Clause argument, at bottom, is that any law requiring one individual to adjust his conduct in order to accommodate himself to another individual's religious observances has the impermissible effect, no matter how reasonable the required accommodation may be, of establishing the religion to which the accommodation is required (see Br. for TWA 23, 26, 28, 29, 36, 40, 41; Br. for Unions 48-54, 56-58,

66-71). Title VII's reasonable accommodation provision is invalid, according to petitioners' analysis, because it compels private employers to adjust their business practices, including those governed by the seniority provisions of a bona fide collective bargaining agreement,[12] to accommodate the religious observances of their employees.

Petitioners have cited no decision of this Court to support the proposition that any law requiring the alteration of private conduct in deference to the religious needs of others is an impermissible establishment of religion. On the contrary, petitioners' analysis is incompatible with the principles of this Court's Establishment Clause decisions.

We start with the principle that a State may—and in some cases must—exempt from the operation of a facially neutral condition or requirement persons whose sincere religious beliefs or practices would be burdened by its application to them. *Sherbert* v. *Verner*, 374 U.S. 398, is the most pertinent illustration of the principle. The Court there invalidated, as an unconstitutional burden on the free exercise of religion, a state law denying unemployment compensation benefits to a member of the Seventh-Day Adventist Church because of her refusal, in accordance with the tenets of her religion, to accept employment requiring Saturday work. The Court held that the State could

[12] As shown above, pp. 22–25, the court of appeals correctly ruled that the question whether Title VII required TWA to take any action inconsistent with the seniority provisions of the collective bargaining agreement need not be reached here.

not, consistently with the Free Exercise Clause, force a sincere Saturday Sabbatarian "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand" (374 U.S. at 404).

Apart from its free exercise holding, the Court in *Sherbert* also considered whether the Establishment Clause barred imposing on the State the duty to exempt from its usual eligibility requirements any claimant whose unavailability for Saturday work was due to religious observance. The Court declared: "In holding as we do, plainly we are not fostering the 'establishment' of the Seventh-Day Adventist religion in South Carolina, for the extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall" (374 U.S. at 409).

Even the two dissenting Justices (Mr. Justice Harlan, joined by Mr. Justice White)—who objected to the Court's free exercise holding on the ground that it would require the State to "*single out* for financial assistance those whose behavior is religiously motivated, even though it denies such assistance to others whose identical behavior (in this case, inability to work on Saturdays) is not religiously motivated" (374 U.S. at 422; emphasis in original)—believed that under the

Establishment Clause "it would be a permissible accommodation of religion for the State, if it *chose* to do so, to create an exception to its eligibility requirements for persons like the appellant" (*ibid.;* emphasis in original). "The constitutional obligation of 'neutrality,' " the dissenting Justices stated, "is not so narrow a channel that the slightest deviation from an absolutely straight course leads to condemnation" (*ibid.*).

Two years earlier, in *Braunfeld* v. *Brown,* 366 U.S. 599, the Court had upheld the constitutional validity of Pennsylvania's Sunday closing law as applied to retail merchants whose religious beliefs—like those of Mrs. Sherbert—precluded them from working on Saturdays. Although the Court divided over whether the Free Exercise Clause *required* the State to exempt Saturday Sabbatarians from the operation of the Sunday closing laws, no Justice doubted that the Establishment Clause permitted a State voluntarily to provide such an exemption. Indeed, the plurality opinion, recognizing that several States had in fact taken that approach, observed that "this may well be the wiser solution to the problem" (366 U.S. at 608).[13]

Finally, in *Wisconsin* v. *Yoder,* 406 U.S. 205, the Court ruled that the Free Exercise Clause precluded the application of Wisconsin's compulsory school-attendance law to Amish parents who sincerely believed that high school attendance for their children was

[13] See also Mr. Justice Frankfurter's separate opinion, joined by Mr. Justice Harlan, in *McGowan* v. *Maryland,* 366 U.S. 420, 459, which applied also to *Braunfeld*: "However preferable, personally, one might deem such an exception [for Saturday Sabbatarians], I cannot find that the Constitution compels it" (366 U.S. at 520).

contrary to their religion. The Court, relying on *Sherbert*, rejected the suggestion that "recognizing an exemption for the Amish from the State's system of compulsory education constituted an impermissible establishment of religion" (406 U.S. at 234-235, n. 22). "Accommodating the religious beliefs of the Amish," the Court stated, does not "support, favor, advance, or assist the Amish," but simply "allow[s] their centuries-old religious society * * * to survive free from the heavy impediment compliance with the Wisconsin compulsory-education law would impose" (*ibid.*).

If it is not an establishment of religion for a State to pay unemployment compensation benefits to a claimant who, but for his religious beliefs and observances, would be denied benefits, and if it is not an establishment of religion for a State to carve out an exception from its Sunday closing laws or compulsory education laws for persons who, but for their religious beliefs and observances, would be required to conform to those laws, then would it be an establishment of religion for a state, in its role as an employer, to make reasonable accommodations to those of its employees whose religious beliefs or observances conflict with normal work schedules? Would it be permissible, for example, for a State agency to excuse a Seventh-Day Adventist from regularly scheduled Saturday work if, without undue hardship to the conduct of the agency's operations, it could arrange for other employees to cover for the absent individual?

The answer, in our view, is clear. For if a State were unable to make such an accommodation, the Seventh-Day Adventist employee would be subjected to the same

kind of burden on the exercise of his religion to which Mrs. Sherbert was subjected by the operation of South Carolina's eligibility requirements for unemployment compensation benefits. Like Mrs. Sherbert, the employee would be forced to "choose between following the precepts of [his] religion and forfeiting benefits [government employment], on the one hand, and abandoning one of the precepts of [his] religion in order to accept [keep] work, on the other hand" (374 U.S. at 404). Whether or not the Free Exercise Clause would require the State to relieve its employee of this burden, the Court's decisions make clear that the Establishment Clause would not prohibit the State from doing so. Here, no less than in *Sherbert*, accommodating the Seventh-Day Adventist would involve nothing more than "neutrality in the face of religious differences" (*id.* at 409).

Nor would it be any more an establishment of religion because the State might have to adjust the work schedules of other employees to accommodate their colleague's Saturday absences. An adjustment of that sort would not "serve to abridge any other person's religious liberties" (*ibid.*), and, as this Court stated in *Zorach* v. *Clauson,* 343 U.S. 306, 315, the Establishment Clause does not mean that "public institutions can make no adjustments of their schedules to accommodate the religious needs of the people." On the contrary, the Court stated, when a State "cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of

our people and accommodates the public service to their spiritual needs" (343 U.S. at 314).

The Court in *Zorach* upheld the validity of a public school "released time" program, even though one of the "adjustments" made necessary by the program required the teachers and students who remained in school during the "released time" period to suspend normal school activities to assure that "the nonreligious attendants [would] not forge ahead of the church-going absentees" (343 U.S. at 324; dissenting opinion of Mr. Justice Jackson). *Zorach* alone thus answers petitioners' contention that requiring one person to accommodate the religious observances of another is a violation of the Establishment Clause. Such a requirement, if otherwise reasonable, is not an establishment of religion as long as it does "not make a religious observance compulsory" and does "not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction" (343 U.S. at 314).[14]

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[14] Thus, a selective service law that exempts religious conscientious objectors from military conscription does not violate the Establishment Clause (*Selective Draft Law Cases,* 245 U.S. 366, 389–390; see *Welsh* v. *United States,* 398 U.S. 333, 369–374 (dissenting opinion); *Gillette* v. *United States,* 401 U.S. 437), even though that religious exemption inevitably requires some other person, in deference to the objector's religious beliefs, to adjust his own conduct to the point of entering military service in place of the objector. Similarly, a state law "forbidding certain activities to be conducted within a set distance from a place of public worship" on Sundays—a prohibition that requires a more direct, if less consequential, accommodation by private persons to the religious practices of others—was sustained by this Court in *Gallagher* v. *Crown Kosher Super Market,* 366 U.S. 617, 627. "[B]ecause the State wishes to protect those who do worship on Sunday does not mean that the State means to impose religious worship on all" (*ibid.*; plurality opinion).

If, therefore, a State does not establish religion when it reasonably accommodates the religious observances of its own employees (and requires other state employees to make the necessary adjustments) we see no basis for concluding that it violates the Establishment Clause when it requires private employers to do the same thing. In neither case is there any prohibited advancement of religion or any interference with the religious liberty of others. In each, the reasonable accommodation reflects, as in *Sherbert*, "neutrality in the face of religious differences" (374 U.S. at 409).

If the government may validly and neutrally relieve its own employees of a burden on the exercise of their religion, there is no Establishment Clause bar to extending the same protection to private employees. Congress is not forbidden to foster an environment, in private industry as well as public employment, that is hospitable to "as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary" (*Zorach* v. *Clauson, supra,* 343 U.S. at 313). Quite apart from what the Free Exercise Clause may require, "it is hardly impermissible for Congress to attempt to accommodate free exercise values, in line with 'our happy tradition' of 'avoiding unnecessary clashes with the dictates of conscience'" (*Gillette* v. *United States,* 401 U.S. 437, 453).

As this Court stated in *Walz* v. *Tax Commission,* 397 U.S. 664, 669, short of "governmentally established religion or governmental interference with religion * * * there is room for play in the joints productive of a benevolent neutrality which will permit religious

exercise to exist without sponsorship and without interference." That is the aim and the effect of Title VII's reasonable accommodation requirement.

C. THE REASONABLE ACCOMMODATION PROVISION REFLECTS A CLEARLY SECULAR PURPOSE, HAS A PRIMARY EFFECT THAT NEITHER ADVANCES NOR INHIBITS RELIGION, AND AVOIDS EXCESSIVE GOVERNMENT ENTANGLEMENT WITH RELIGION

This Court has formulated, in cases involving government financial aid to religious educational institutions, a three-part test to help "identify instances in which the objectives of the Establishment Clause have been impaired" (*Meek* v. *Pittenger,* 421 U.S. 349, 359). "[T]o pass muster under the Establishment Clause the law in question, first, must reflect a clearly secular legislative purpose, * * * second, must have a primary effect that neither advances nor inhibits religion, * * * and, third, must avoid excessive government entanglement with religion" (*Committee for Public Education* v. *Nyquist,* 413 U.S. 756, 773).

This case, of course, involves no financial support to any religious institution—one of the principal "evils against which the Establishment Clause protects" (*Meek* v. *Pittenger, supra,* 421 U.S. at 359)—and there may accordingly be room to argue that a less rigorous test should be applied. We do not advance such an argument, however, because the statutory provision at issue in this case so plainly satisfies each element of the three-part test.

1. The reasonable accommodation provision challenged by petitioners serves the same "clearly secular

legislative purpose" (*Committee for Public Education* v. *Nyquist, supra,* 413 U.S. at 773) as that served by Title VII generally—"to achieve equality of employment opportunities" by "remov[ing] * * * artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification" (*Griggs* v. *Duke Power Co., supra,* 401 U.S. at 429, 431). Congress has properly determined that an individual's employment opportunities should depend solely upon job qualifications and that one's religion—as well as one's race, nationality, and sex—should not be permitted to affect those opportunities except in the rare instance when it bears significantly on the question of job qualifications. The reasonable accommodation provision (Section 701(j) of the Act) represents a permissible legislative effort—plainly secular in purpose—to identify the circumstances in which it may fairly be said that an individual's religious practices are sufficiently relevant to his job qualifications that they may properly be taken into account in connection with an employment decision.

This secular purpose is reflected in the provision's legislative history. Section 701(j) was added in 1972 by a Senate floor amendment to the Equal Employment Opportunity Act of 1972, 86 Stat. 103. Senator Randolph, who proposed the amendment, stated that it was intended to further Title VII's guarantee of "freedom from religious discrimination in the employment of workers" and "to resolve by legislation—and in a way I think was originally intended by the [1964] Civil

Rights Act—[an issue] which the courts apparently have not resolved" (118 Cong. Rec. 705, 706 (1972)). That issue was the extent to which Title VII's ban on religious discrimination limited an employer's freedom to discharge or refuse to hire an individual whose religious practices or observances conflicted with the employer's work schedules. Senator Randolph referred (118 Cong. Rec. 705-706 (1972)) to *Dewey* v. *Reynolds Metals Co.,* 402 U.S. 689, which had affirmed by an equally divided Court a Sixth Circuit decision (429 F. 2d 324) sustaining the lawfulness of an employer's discharge of an employee who refused for religious reasons to work on Sundays.[15]

Senator Randolph's remarks included an expression of special concern about the dwindling membership of some Sabbatarian sects (118 Cong. Rec. 705 (1972)), but the overriding theme of his observations was that the amendment was needed to eliminate "religious discrimination in * * * employment" (*ibid.*), and he agreed with Senator Dominick that the provision would protect the equal employment opportunities, not only of Sabbatarians, but also the members of any "other religious sect which has a different method of conducting their lives than do most Americans" (*id.* at 706). The aim was not to advance religion but rather, in "the

[15] Senator Randolph inserted into the Congressional Record the Sixth Circuit's opinion and this Court's order of affirmance in *Dewey,* a district court opinion in a similar case, and the Equal Employment Opportunity Commission's 1967 Guidelines on Discrimination Because of Religion (which imposed a reasonable accommodation requirement nearly identical to that proposed by Senator Randolph (118 Cong. Rec. 706–730 (1972)).

spirit of religious freedom" (*ibid.*), to ensure that no individual's religious practices would needlessly restrict his work opportunities. That is a valid secular objective fully in accord with the purposes of Title VII as a whole.

That a law may, in the minds of some legislators, have a religious purpose in addition to a proper secular purpose does not, under this Court's decisions, render it invalid under the Establishment Clause. The Court's test requires only that a law reflect a valid secular purpose. It does not mean that the law must be devoid of all religious purpose whatsoever.[16]

Furthermore, while one of Senator Randolph's purposes in proposing his amendment may have been to prevent the dwindling of the membership rolls of some religious groups, that is not, in the context of his specific proposal, a purpose to advance religion. Rather, his amendment's purpose was to assure that no individual of any faith will needlessly be required "to choose between his religious faith and his economic survival" (*Braunfeld* v. *Brown, supra,* 366 U.S. at 616) (Stewart, J., dissenting)—thereby necessarily also protecting religious institutions from the adverse consequences of religiously discriminatory employment practices. That is an entirely legitimate legislative objective.

We accordingly conclude that Section 701(j) "is adequately supported by legitimate, nonsectarian [governmental] interests" (*Committee for Public Education* v. *Nyquist, supra,* 413 U.S. at 773). That was also the conclusion of Senator Williams—chief sponsor and floor manager of the 1972 Senate bill—at the time of Senator Randolph's floor amendment. After discussing with Senator Randolph the extent of the accommodation that would be required of an employer under the proposed amendment, Senator Williams stated that he "certainly agree[d] with the objective of the amendment," that the provision appeared to promote the free exercise values embodied in the First Amendment, and that he could see "no problem" with the provision under the Establishment Clause (118 Cong. Rec. 706 (1972)).

[16] There is, for example, no constitutional requirement that all coincidence between the Ten Commandments and the prohibitions in the criminal code be entirely inadvertent.

2. The primary effect of the reasonable accommodation provision is the same as its secular purpose—to preserve the equal employment opportunities of individuals whose religious requirements conflict with the work schedules of their employers but can be accommodated without undue hardship. The primary effect neither advances nor inhibits religion but rather removes artificial and unnecessary barriers to employment by ensuring that a person's religion or religious observance remains "irrelevant" (*Griggs* v. *Duke Power Co., supra,* 401 U.S. at 436) in connection with his job opportunities except when they significantly affect his job qualifications. As the court of appeals stated in *Cummins* v. *Parker Seal Co., supra,* 516 F.2d at 553:[17]

[17] In rejecting petitioners' constitutional challenge, the court of appeals relied heavily upon the Sixth Circuit's opinion in *Cummins* (A. 265–266).

> In practice, the reasonable accommodation rule restrains employers from enforcing uniform work rules that, although facially neutral, discriminate in effect against employees holding certain religious convictions. Thus the rule guarantees job security except when accommodation of an employee's religious practices would impose an undue hardship upon the employer's business.

The accommodation requirement may incidentally benefit some religious institutions by allowing working men and women to attend religious services without forfeiting their jobs. But that was equally true of the Sunday closing laws upheld by this Court in *McGowan* v. *Maryland, supra,* and its companion cases. See also *Zorach* v. *Clauson, supra.* Indeed, this Court has repeatedly recognized that "not every law that confers an 'indirect,' 'remote,' or 'incidental' benefit upon religious institutions is, for that reason alone, constitutionally invalid" (*Committee for Public Education* v. *Nyquist, supra,* 413 U.S. at 771). The statute here does not compel church attendance or religious contributions, nor does it limit its protection to persons whose religious observance includes organized religious activity.

Petitioners object to the statute on the ground that it grants "preferential treatment" to a class of persons determined strictly on religious grounds (Br. for TWA 23; Br. for Unions 50-51). But when the evil that Congress seeks to eradicate—employment discrimination because of religion—itself affects a class of persons determined strictly on religious grounds, a legislative

prohibition of the offensive conduct does not grant "preferential treatment" to the affected class but merely relieves its members of a special burden that others do not suffer.[18]

This Court's decisions demonstrate the fallacy of petitioners' "preferential treatment" argument. If it is not a violation of the Establishment Clause to pay unemployment compensation benefits to a claimant solely because her apparent ineligibility is a function of Sabbatarian religious observances (*Sherbert* v. *Verner, supra*), or to exempt from the operation of Sunday closing laws a class of persons whose religious beliefs require the observance of some other day as the Sabbath (*Braunfeld* v. *Brown, supra*), or to excuse from compliance with compulsory school attendance laws persons whose religious beliefs and practices conflict with such a requirement (*Wisconsin* v. *Yoder, supra*), or to release from public school attendance a class of students who wish to go to religious centers for religious instruction or devotional exercises (*Zorach* v. *Clauson, supra*), then neither does it violate the Establishment Clause to extend equal employment opportunity protection to a class of individuals whose religious observances might otherwise needlessly cost them their jobs. While it is possible to label pejoratively all such efforts

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[18] Petitioners themselves grant "preferential treatment" to Christians. The collective bargaining agreement names Good Friday and Christmas—but none of the holy days of other religions—as company holidays (A. 216), although, of course, T.W.A. operates on those days. Such a reasonable accommodation to majority religious beliefs places a greater hardship on T.W.A. (which pays 2½ times the usual rate for work on those days) than the accommodation which Hardison seeks.

to accommodate free exercise values as "preferential treatment," that does not in itself detract from their constitutional permissibility. Nor does the reasonable accommodation rule improperly "foster * * * certain sects" (Br. for TWA 38-39). The statute on its face applies to "*all* aspects of religious observance and practice" (emphasis added), and the legislative history confirms that no one sect or group of sects was intended to be singled out for protection to the exclusion of others (see p. 47-48, *supra*). As in *Gillette* v. *United States, supra*, 401 U.S. at 450-451, "no particular sectarian affiliation or theological position is required," and the statute "does not single out any religious organization or religious creed for special treatment." [19]

If, by its operation, the statute protects from needless loss of employment only those workers whose religious beliefs require them to behave in a way that conflicts with their employers' work schedules, that is not legislative favoritism of some religious sects over others. It merely defines the class of workers whose employment opportunities would otherwise be reduced because of "unnecessary barriers" (*Griggs* v. *Duke Power Co., supra,* 401 U.S. at 431) that Congress—for valid secular reasons—sought to eliminate.

TWA's favoritism argument is essentially the same as the one rejected in *Gillette*, where the Court found

[19] The Equal Employment Opportunity Commission has adopted, in its application of the reasonable accommodation requirement, the same broad definition of religion that this Court applied in *United States* v. *Seeger*, 380 U.S. 163, and *Welsh* v. *United States*, 398 U.S. 333, in connection with the military conscientious objector provision. *E.g.*, EEOC Decision No. 76–104 (April 2, 1976), reported at CCH EEOC Dec. ¶ 6500.

"a neutral, secular justification" (401 U.S. at 460) for exempting from military service only those conscientious objectors who were opposed to participation in war in any form and not those who were opposed to participation in a particular war only. The contention there, like the company's assertion here, was that the statutory provision "work[ed] a de facto discrimination among religions" (*id.* at 451-452) by favoring those whose doctrine brought their adherents within the scope of the exemption.

As in *Gillette*, the statute here serves "valid purposes having nothing to do with a design to foster or favor any sect, religion, or cluster of religions" (*id.* at 452), and its provisions are "focused on individual conscientious belief, not on sectarian affiliation" (*id.* at 454). Indeed, the statute here, unlike that in *Gillette,* is not even arguably "underinclusive" (*id.* at 452). The protected class here is fully coextensive with the class of persons who might otherwise be subjected to needless restrictions on employment opportunities on account of their religious practices.

In sum, the primary effect of the reasonable accommodation provision is "not to support, favor, advance, or assist" religion generally or some religions in particular (*Wisconsin* v. *Yoder, supra,* 406 U.S. at 234-235, n. 22). Rather, it is to prevent employment discrimination on the basis of an individual's religious practices by requiring employers to accommodate such practices if they can reasonably do so without undue hardship in the conduct of their business. That the statute thereby allows working persons to practice their religion "free from the heavy impediment" (*ibid.*) that such discrim-

ination would otherwise impose does not render the provision unconstitutional. On the contrary, it tends to further the interests of the Establishment Clause by allowing for religious diversity and pluralism—— "mak[ing] room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary" (*Zorach* v. *Clauson, supra,* 343 U.S. at 313). The reasonable accommodation provision reflects a wholly proper "attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma" (*ibid.*).

3. The statute involves no excessive government entanglement with religion. The reasonable accommodation requirement will not subject religious institutions to the sort of "comprehensive, discriminating, and continuing [governmental] surveillance" that this Court found impermissible in *Lemon* v. *Kurtzman,* 403 U.S. 602, 619. The statute and regulation require little or no contact between religious institutions and governmental entities.

TWA sees the danger of excessive entanglement in that "those enforcing the requirement will necessarily weigh and determine whether an individual has a religious belief, whether it is sincerely held and how that belief is manifested in the employment relationship" (Br. 42; footnote omitted).[20] But the inquiry required here is essentially the same as that mandated, as a constitutional requirement, by this Court's decision in *Sherbert* v. *Verner, supra,* and regarded unanimously

[20] The Unions advance a similar argument (Br. 42–46).

by the Justices participating in that decision as permissible under the Establishment Clause. As the court of appeals explained in *Cummins* v. *Parker Seal Co., supra,* 516 F.2d at 553-554:

> For the most part, the EEOC and the courts will have to determine simply whether the employer has made a reasonable accommodation and whether an undue hardship will result. These issues will be considered in the labor relations context, and their resolution certainly does not necessitate any government entanglement with religion.
>
> [Parker Seal] suggests, however, the EEOC investigators will be forced to study and to evaluate the dogma of the many religious sects in order to ascertain whether employees' practices and observances are genuinely religious and therefore protected under Title VII. In most cases, this issue probably will not be disputed seriously. To the extent that the question does arise, however, we think that it will require no more government involvement in religion than the concededly nonexcessive entanglement that occurs when a state must determine whether a purported church qualifies for a property tax exemption. *See* Walz v. Tax Comm'n, 397 U.S. 664, 674-76 (1970); *id.* at 698-99 * * * (opinion of Harlan, J.).

Contrary to TWA's interpretation of the legislative history of Section 701(j) (Br. 42 n. 25), the flexibility and discretion with which Congress believed the statute would be administered refer not to judgments concern-

ing the sincerity of an employee's beliefs or the tenets of his religion but rather to the pragmatic determinations concerning reasonableness and undue hardship in the circumstances of particular cases. Although some inquiry into sincerity may occasionally be required, that has not generally been an issue in cases involving the reasonable accommodation requirement.[21]

The government's involvement with religious institutions under the statute "can hardly be characterized as * * * active" (*Wisconsin* v. *Yoder, supra,* 406 U.S. at 234 n. 22). Rather, it would be " 'quick and non-judgmental' " (*Roemer* v. *Maryland Public Works Bd.,* No. 74-730, decided June 21, 1976, slip op. 26 (plurality opinion)).

[21] See, *e.g., Reid* v. *Memphis Publishing Co., supra,* 468 F. 2d at 348 (C.A. 6); *Riley* v. *Bendix Corp., supra,* 464 F. 2d at 1114 (C.A. 5); *Dewey* v. *Reynolds Metals Co., supra,* 429 F. 2d at 335; *Dawson* v. *Mizell,* 325 F. Supp. 511, 513 (E.D. Va.); *Jackson* v. *Veri Fresh Poultry Inc.,* 304 F. Supp. 1276, 1278 (E.D. La.).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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MARCH 1977.

☆ U.S. Government Printing Office: 1977—231-347/75